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No. 89-1028

In The

Supreme Court of the United States

October Term, 1989

CSX TRANSPORTATION, INC.,

Petitioner,

v.

BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA,

Respondents.

BRIEF FOR THE PETITIONER

James S. Whitehead
(Counsel of Record)
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603
(312) 853-7703

Nicholas S. Yovanovic
James D. Tomola
CSX Transportation, Inc.
500 Water Street
Jacksonville, Florida 32202

Attorneys for Petitioner
CSX Transportation, Inc.

Date: May 25, 1990

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does § 11341(a) of the Interstate Commerce Act empower the Interstate Commerce Commission to override a provision of a collective bargaining agreement where necessary to do so in order to prevent a rail consolidation found by the Commission to be in the public interest from being obstructed by such agreement?

LIST OF PARTIES AND RULE 29.1 LIST

The parties before the court of appeals and this Court are all listed in the caption.[1]

CSX Transportation, Inc. ("CSXT") is a wholly-owned subsidiary of CSX Corporation ("CSX"). The subsidiaries and affiliates of CSXT or CSX, other than those wholly owned by them, are:

The Akron Union Passenger Depot Company;
Allegheny and Western Railway Company;
Augusta and Summerville Railroad Company;
The Baltimore and Cumberland Valley Railroad Extension Company;
Beaver Street Tower Company;
Central Transfer Railway and Storage Company;
Chatham Terminal Company;
Clearfield and Mahoning Railway Company;
Dayton and Michigan Railroad Company;
The Home Avenue Railroad Company;
The Lakefront Dock and Railroad Terminal Company;
Mid-Allegheny Corporation;
North Charleston Terminal Company;
Richmond-Washington Company, which has a subsidiary, RF&P Corporation;
Winston-Salem Southbound Railway Company;
Woodstock & Blockton Railway Company

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[1] This case has been consolidated with No. 89-1027, *Norfolk & W. Ry. v. American Train Dispatchers Ass'n*. The parties in No. 89-1027 are petitioners, Norfolk and Western Railway Co. and Southern Railway Co., and respondents, American Train Dispatchers Association, Interstate Commerce Commission, and the United States of America.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit in *Brotherhood of Ry. Carmen v. ICC*, as amended by order dated September 29, 1989 (Pet. App. 27a-28a), is reported at 880 F.2d 562. Pet. App. 1a-26a. The June 8, 1988, decision of the Interstate Commerce Commission in *CSX Corp. – Control – Chessie Sys. & Seaboard Coast Line Indus.* is reported at 4 I.C.C. 2d 641. Pet. App. 33a-52a. The March 23, 1987, arbitration decision (Pet. App. 53a-117a), which was reviewed by the Interstate Commerce Commission, is unreported.

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit entered its judgment on July 25, 1989. Pet. App. 29a. CSXT timely filed a petition for rehearing, which was denied by the court of appeals by order dated September 29, 1989. Pet. App. 30a.[2] The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

Section 11341(a) of the Interstate Commerce Act ("ICA"), 49 U.S.C. § 11341(a) (1982), is set forth in an Appendix to this brief. App., *infra*, at 1a. Section 11341(a)'s predecessors, found in (i) § 407 of the Transportation Act of 1920, ch. 91, 41 Stat. 480; (ii) Title II, § 202 of the Emergency Railroad Transportation Act of 1933, ch. 91, 48 Stat. 219; and (iii) § 7 of the Transportation Act of 1940, ch. 722, 54 Stat. 908-09, are set forth in Pet. App. 118a-119a.

[2] A petition for rehearing was also filed by Norfolk & Western Railway Company and Southern Railway Company, intervenors in D.C. Cir. No. 88-1694. *See* n.1, *supra*. This petition was denied by the court of appeals on September 29, 1989. Pet. App. 30a. The Interstate Commerce Commission also filed a petition for rehearing, in which it asked the court of appeals to defer any ruling thereon until after the Commission's decision on remand. By order dated September 29, 1989, the court remanded the record in this matter to the Commission and ordered that consideration of the Commission's petition be deferred pending release of the ICC's decision on remand. Pet. App. 32a.

STATEMENT OF THE CASE

I. The Statutory Framework

Congress has granted the Interstate Commerce Commission ("ICC" or "Commission") exclusive authority under Chapter 113 of the Interstate Commerce Act, 49 U.S.C. §§ 11301-11367 (1982), to examine, condition, and approve proposed railroad mergers and consolidations.[3] The ICA requires the Commission to "approve and authorize a transaction under this section when it finds that the transaction is consistent with the public interest." 49 U.S.C. § 11344(c) (1982). Among the factors that the Commission must consider in making its public interest determination are "the interests of carrier employees affected by the proposed transaction." 49 U.S.C. § 11344(b)(1)(D) (1982).[4]

[3] Chapter 113 governs not only carrier mergers but the exercise of control by one carrier over another or by a holding company over more than one rail carrier. *See* ICA § 11343(a)(3), (4), (5), 49 U.S.C. § 11343(a)(3), (4), (5) (1982).

[4] The Commission's mandate is to consider the entire spectrum of interests in evaluating whether a proposed consolidation is in the public interest. Employee interests are only one of the factors; Congress clearly did not state that employee interests were to take precedence. The Commission is required to consider "at least":

> (A) the effect of the proposed transaction on the adequacy of transportation to the public;
>
> (B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transactions;
>
> (C) the total fixed charges that result from the proposed transaction;

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ICA § 11347 requires the Commission to impose conditions to protect the interests of employees who are adversely affected by an approved consolidation. 49 U.S.C. § 11347 (1982). The Commission has satisfied this requirement by imposing its *New York Dock* labor conditions[5] since 1979 in carrier consolidation proceedings. The *New York Dock* Conditions provide employees affected by a rail consolidation with up to six years of income protection from the time they are first adversely affected as well as reimbursements for moving costs and losses from the sale of a home, where applicable. *New York Dock* Conditions, Art. I, §§ 5, 6, 9, 12; *New York Dock*, 360 I.C.C. at 86-89.

The *New York Dock* Conditions also contain a mandatory, expedited bargaining/arbitration procedure for the establishment of so-called "implementing agreements" between rail carriers and the rail unions that represent employees affected by an ICC-approved consolidation. These implementing agreements govern how the actual

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(D) the interest of carrier employees affected by the proposed transaction; and

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

49 U.S.C. § 11344(b)(1) (1982). *Cf. McLean Trucking Co. v. United States*, 321 U.S. 67, 85 (1944) (While ICC is to consider effect of consolidation on competition, "the Commission is not to measure proposals for all-rail or all-motor consolidations by the standards of the anti-trust laws".); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 456 (1945) (*semble*).

[5] *New York Dock Ry. – Control – Brooklyn E. Dist. Term.*, 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

consolidation of operations is to occur. Under Art. I, § 4(a) of the conditions, the carrier must give those employees who will be affected by such an operational change and their unions at least 90 days advance written notice. If the carriers and unions are unable to agree on such an implementing agreement after bargaining for 30 days, either party may submit the dispute for an expedited determination by a neutral arbitrator. *Id.* at 85.[6]

Once a rail carrier consolidation has been approved by the Commission, § 11341(a) of the ICA expressly immunizes the carriers from compliance with obligations arising out of "the antitrust laws and *from all other law*, including State and municipal law, as necessary" to allow them to carry out the approved consolidation. Emphasis added.

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[6] In contrast, the bargaining procedures of the Railway Labor Act ("RLA") (RLA §§ 5, 6, 7, 45 U.S.C. §§ 155, 156, 157 (1982)) are neither bounded nor expedited. Because arbitration of so-called "major disputes," involving changes in bargaining agreements and working conditions, is purely voluntary under the RLA (*see* RLA §§ 5 First, 7 First, 45 U.S.C. §§ 155 First, 157 First), "[n]o authority is empowered to decide the dispute," and "the parties [are] wholly free at their own will, to agree or not agree." *Elgin J. & E. R.R. v. Burley*, 325 U.S. 711, 725 (1945); *see also Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570, 579 n.11 (1971). Moreover, these procedures are "purposely long and drawn out," "almost interminable," and "virtually endless." *Brotherhood of Ry. Clerks v. Florida E. C. R.R.*, 384 U.S. 238, 246 (1966); *Detroit & T. S. L. R.R. v. United Transp. Union*, 396 U.S. 142, 149 (1969); *Burlington N. R.R. v. Brotherhood of Maint. of Way Employees*, 481 U.S. 429, 444 (1987). While carriers are free to implement changes once they have finally exhausted the RLA bargaining procedures, they are then faced with the prospect of crippling strikes, including nationwide secondary picketing, to block such changes. *Florida E. C. R.R.*, 384 U.S. at 244; *Burlington N. R.R.*, 481 U.S. at 451-53.

II. The Creation of the Consolidated CSX Rail System

In 1980, the ICC approved, pursuant to 49 U.S.C. § 11343, the application of CSX Corporation to control the rail subsidiaries of Chessie System, Inc. and Seaboard Coast Line Industries, Inc.[7] *CSX Corp. – Control – Chessie Sys. & Seaboard Coast Line Indus.*, 363 I.C.C. 521 (1980) ("*CSX – Control*"). After weighing all of the evidence before it, including evidence and arguments submitted by rail labor (*see* 49 U.S.C. § 11344(b)(1)(D)), the Commission concluded that substantial economies would result from the creation of this consolidated rail system and, accordingly, that the proposal was consistent with the public interest. 49 U.S.C. § 11344(c); *CSX – Control*, 363 I.C.C. at 597-98. The Commission imposed upon the carriers its standard *New York Dock* labor protection conditions. *Id.* at 589.

Both carrier and labor witnesses in *CSX – Control* recognized that the carriers, as a result of the authority conferred on them by the Commission, would be enabled to make numerous operational changes, including shop consolidations,[8] to realize the efficiencies flowing from

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[7] Among the railroads controlled by Chessie was The Chesapeake and Ohio Railway Company ("C&O"). Seaboard Coast Line Industries controlled the Seaboard Coast Line Railroad Company ("SCL") and the Louisville and Nashville Railroad Company ("L&N"), *inter alia*. On December 29, 1982, SCL merged with L&N to form Seaboard System Railroad, Inc. On July 1, 1986, Seaboard System Railroad changed its name to CSX Transportation, Inc. ("CSXT"), Petitioner herein. C&O subsequently merged into CSXT in 1987.

[8] While the carriers did not specifically address the consolidation of the C&O freight car heavy repair shop at Raceland, Kentucky, and the comparable CSXT shop at Waycross,

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the consolidation. ICC C.I.[9] 1, Vol. II, App. C, Exh. 15, at 1-2, 7-11; Exh. 16.[10] Furthermore, the Commission also

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Georgia, in the short-term operating plan they presented to the Commission, the carriers saw the elimination of excess capacity at Raceland as one major benefit of the proposed consolidation. *CSX – Control*, 363 I.C.C. at 538, 561.

[9] "ICC C.I." refers to the consolidated index of the ICC proceedings in *CSX – Control*, Finance Doc. No. 28905 (Sub-No. 22), filed on June 14, 1989, with the court of appeals below in No. 88-1724 (D.C. Cir.).

[10] For example, the General Counsel of the Brotherhood of Maintenance of Way Employees acknowledged in a verified statement filed in *CSX – Control*:

> It is apparent from the testimony presented by applicant's witnesses that extensive changes, many of which will not require separate Commission approval, will be undertaken once appropriate authority has been granted by this Commission. . . .

ICC C.I. 1, Vol. II, Exh. 17, at 8. Indeed, John O'B. Clarke, Jr., one of the attorneys for Respondent Brotherhood of Railway Carmen here and counsel for several rail unions in *CSX – Control*, explained to the Commission's administrative law judge:

> Your Honor, so far the evidence in this case shows that the plan that the CSX Corporation will follow once it is combined is a gradual identification of the strengths and weaknesses, and then after that is done there will be a gradual, we submit, coordination of operations as a result of that.
>
> * * * [I]f you didn't have a combination of systems, you wouldn't be able to change it by coordinating operations of one railroad into another railroad.

ICC C.I. 1, Vol. II, App. C, Exh. 18, at 1-2. In his brief to the Commission in *CSX – Control*, Mr. Clarke acknowledged that the Commission's approval of the control application would result in "consolidations of operations and rerouting of traffic which are bound to occur as the needs of the merged carrier develop." *Id.*, Exh. 20, at 9.

recognized, in its opinion granting the proposed consolidation, that "additional coordinations [not then specifically identified] may occur that could lead to further employee displacements" as a result of its grant of control authority. *CSX – Control*, 363 I.C.C. at 589. Nonetheless, the Commission rejected rail labor's request for enhanced labor protection benefits[11] beyond those provided in its *New York Dock* Conditions, which it found adequately protected the employees' interests. *Ibid.*

III. Shop Consolidations and Operational Coordinations on the Consolidated CSX System

Following the Commission's decision in *CSX – Control*, the rail carriers controlled by CSX Corporation embarked on a series of operational changes designed to realize the economies and efficiencies the Commission had found to be in the public interest.

On at least three occasions these changes involved the movement of carmen's work and members of the Brotherhood of Railway Carmen ("BRC") from one CSX railroad to another. In each instance an arbitrator appointed under Art. I, § 4(a) of the *New York Dock*

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[11] Rail labor asked the Commission, *inter alia*, to presume conclusively that any employee placed in a worse position within ten years of the date of the consolidation would be entitled to income protection, without any showing that such loss was caused by the consolidation, and to protect employees from being required to relocate their residences. *CSX – Control*, 363 I.C.C. at 589. The Commission recognized that such provisions, if adopted, would "preserve unnecessary jobs and unduly restrict a carrier's ability to establish economical operations" and "[its] ability to use its employees productively." *Id.* at 590.

Conditions prescribed an implementing agreement providing for the proposed movement of the work and employees, thereby overriding terms of the applicable bargaining agreements, in return for which the affected employees received the moving benefits and income protections contained in the conditions. *See* ICC C.I. 1, Vol. II, App. C, Exh. 26, 27, 28. BRC did not seek Commission review of any of these arbitration awards. Nor did it commence any judicial proceedings in which it argued that these changes could be carried out only after the seniority terms and other provisions of existing collective bargaining agreements had been modified through the bargaining procedures of the RLA.[12]

IV. The Waycross-Raceland Shop Consolidation and the Arbitration Award

On August 29, 1986, CSXT and C&O gave their employees notice under *New York Dock* Art. I, § 4(a) of their intent to close the CSXT freight car heavy repair shop in Waycross, Georgia, and to consolidate that work with that being performed in the counterpart C&O shop at Raceland, Kentucky. When bargaining with BRC over the terms of an implementing agreement was not successful,

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[12] Other operational changes and facility consolidations following *CSX – Control* that resulted in the movement of work and employees beyond the scope of then-existing collective bargaining agreements were routinely accomplished through the arbitration process prescribed in Art. I, § 4(a) of *New York Dock*. ICC C.I. 1, Vol. II, App. C, Exh. 29, 31, 32. In numerous other instances the railroads and unions, including BRC, were able to negotiate implementing agreements to govern such changes under Art. I, § 4(a) without having to invoke the services of a neutral arbitrator. *See, e.g., id.*, Exh. 33, 34, 35, 36A, 36B, 36C, 36D, and 46.

both the railroads and BRC invoked arbitration under *New York Dock* Art. I, § 4(a).

BRC argued in the arbitration proceeding that the three-person arbitration committee lacked authority under the *New York Dock* Conditions and the ICA to impose an implementing agreement moving carmen and their work beyond the boundaries of the former Seaboard system as a result of certain provisions in the so-called Orange Book Agreement, which was applicable to certain Waycross employees, and as a result of the basic collective bargaining agreements in place at Waycross and Raceland.[13] BRC contended that the carriers had to utilize the RLA bargaining procedures to amend these agreements to permit such movement.

The *New York Dock* arbitration committee, applying prior ICC precedents,[14] ruled that the bargaining/arbitration procedure prescribed in the Commission's labor

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[13] The Orange Book Agreement is not the basic agreement governing the wages, rules, and working conditions of BRC members employed by CSXT. It is a protective agreement that was entered into by the Seaboard Air Line Railroad Company ("SAL") and the Atlantic Coast Line Railroad Company ("ACL") and the unions representing their employees in connection with the July 1, 1967, merger of those railroads to form SCL, a predecessor of Petitioner. *See* n.7, *supra*. The Orange Book protects those individuals who were employed by either SAL or ACL on or before the SCL merger from income loss for the remainder of their employment with CSXT and expressly allowed SCL to move employees and their work anywhere on the six-state SCL system.

[14] *Denver & R. G. W. R.R. – Trackage Rights – Missouri Pac. R.R. Between Pueblo, CO and Kansas City, MO*, ICC Dec. Finance Doc. No. 30,000 (Sub-No. 18) (served Oct. 25, 1983), *vacated and remanded sub nom. Brotherhood of Loc. Eng'rs v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), *vacated*, 482 U.S. 270 (1987); *Maine Central R.R.*

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protection conditions supersedes the bargaining procedures of the RLA to resolve disputes in connection with the implementation of a rail consolidation as a result of ICA § 11341(a). Pet. App. 80a. Accordingly, the committee concluded that it had the authority to impose an implementing agreement that provided for the movement of both the freight car repair work and employees who performed it from Waycross to Raceland, notwithstanding the provisions in the Orange Book Agreement that it found prohibited such movements or any other existing collective bargaining agreements. Pet. App. 82a. The arbitration committee imposed an implementing agreement transferring car repair work to Raceland; it refused, however, to prescribe an implementing agreement that would allow the carriers to reassign Orange Book-protected employees to positions at Raceland. Instead, the arbitration award allowed these employees to remain in Waycross with their Orange Book income guarantees intact, notwithstanding the transfer of their freight car heavy repair work to Raceland.[15] Pet. App. 82a-85a.

V. The Commission's Ruling on Appeal

Both BRC and CSXT appealed the arbitration award to the ICC. In its June 8, 1988, decision, the Commission

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– *Exemption from 49 U.S.C. 11342 and 11343*, ICC Dec. Finance Doc. No. 30,532 (served Sept. 16, 1985), *aff'd mem. sub nom. Railway Labor Exec's' Ass'n v. ICC*, 812 F.2d 1443 (D.C. Cir. 1987).

[15] CSXT and C&O subsequently implemented the shop consolidation to the extent allowed by the arbitration award, transferring the repair work and non-Orange Book-protected employees to Raceland.

affirmed the arbitration committee's determination that it had the authority as a result of ICA § 11341(a) to prescribe an implementing agreement moving both work and employees, notwithstanding BRC's claims that such a change in existing agreements and working conditions could be accomplished only through the RLA's bargaining procedures. *CSX – Control*, 4 I.C.C. 2d at 649; Pet. App. 43a.[16] The Commission reversed the arbitration committee's refusal to provide for the transfer of employees protected by the Orange Book:

> [T]he Orange Book agreement as interpreted by the committee serves as an impediment to implementation of a transaction authorized by the Commission. Once it is determined that a proposed transaction is authorized by the Commission . . . , the carrier is permitted to carry out and fully implement the transaction despite potential impediments in existing agreements upon compliance with the provisions for the protection of employees contained in *New York Dock* or imposed by the Commission upon the involved transaction.

Id. at 650; Pet. App. 44a.

VI. The Court of Appeals' Decision

BRC sought review of the Commission's decision by the D.C. Circuit,[17] which, in a July 25, 1989, opinion,

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[16] The Commission also affirmed the arbitration committee's determination that the Waycross/Raceland shop consolidation was authorized by the Commission's 1980 order. *CSX – Control*, 4 I.C.C. 2d at 648; Pet. App. 42a.

[17] BRC initially filed a petition to review in the United States Court of Appeals for the Eleventh Circuit. The proceeding was subsequently transferred to the D.C. Circuit, pursuant to 28 U.S.C. § 2343 (1982). CSXT was granted leave to intervene under 28 U.S.C. § 2348 (1982) and Fed. R. App. P. 15(d).

reversed the Commission's decision and remanded the record to the Commission for further proceedings. The court of appeals ruled that ICA § 11341(a) does not empower the Commission to override contracts, including collective bargaining agreements.[18] *Brotherhood of Ry. Carmen*, 880 F.2d at 567-68; Pet. App. 19a. The court remanded the record to the Commission for consideration of whether modification of collective bargaining agreement provisions that would stand in the way of approved rail consolidations might be supported by other provisions of the ICA.[19]

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[18] The court of appeals erroneously stated in its opinion that the Commission also had deprived Orange Book-protected carmen of their entitlement to that agreement's extended income protection benefits. *Brotherhood of Ry. Carmen*, 880 F.2d at 564; Pet. App. 6a. In fact, the Commission had reversed the arbitration award only "to the extent it holds that CSX may not require transfer of SCL employees as well as work from Waycross to Raceland." *CSX – Control*, 4 I.C.C. 2d at 650; Pet. App. 44a. Orange Book-protected carmen transferred to Raceland would have remained entitled to the income protections of that agreement.

[19] Thus, the court of appeals did not decide whether the Commission might possess the authority to prescribe a procedure, apart from the RLA, to modify such agreements as a component of the Commission's labor conditions under ICA § 11347, 49 U.S.C. § 11347. *Brotherhood of Ry. Carmen*, 880 F.2d at 573-74; Pet. App. 25a. Similarly, the court did not determine whether a carrier was immune from complying with the bargaining procedures of the RLA as a result of ICA § 11341(a), preferring to let the Commission reconsider this issue on remand. *Id.* at 573; Pet. App. 25a.

SUMMARY OF ARGUMENT

The court of appeals' unprecedented ruling that Congress intended obligations arising out of collective bargaining agreements in the rail industry, enforceable solely as a result of the Railway Labor Act, to be an exception to § 11341(a) of the Interstate Commerce Act, which generally exempts railroads implementing consolidations approved by the Interstate Commerce Commission from "all other law . . . as necessary to . . . carry out the transaction", is in error and should be reversed by this Court for several reasons:

First, the court of appeals' decision is contrary to this Court's decision in *Schwabacher v. United States*, 334 U.S. 182 (1948), which interpreted § 11341(a)'s predecessor as immunizing consolidating rail carriers from contractual obligations that would otherwise interfere with an ICC-approved consolidation. In addition, the court of appeals ignored this Court's decision in *United States v. Lowden*, 308 U.S. 225 (1939), in which this Court expressly recognized that seniority rights flowing from rail collective bargaining agreements would of necessity be overriden in the implementation of an ICC-approved rail merger.

Second, the court of appeals' interpretation of § 11341(a) is contrary to the statute's plain terms, both as currently codified and as that section's language has evolved since the Transportation Act of 1920, ch. 91, 41 Stat. 456.

Third, the court of appeals' construction is contrary to the section's legislative history. The court below erred in its interpretation of the legislative history it did consider and, more importantly, ignored other Congressional actions – particularly the provisions of the Emergency Railroad Transportation Act of 1933, ch. 91, 48 Stat. 211, and the legislative history of the Transportation Act of 1940, ch. 722, 54 Stat. 898. The history of these two acts demonstrates Congress' express intent that obligations

arising out of the RLA and collective bargaining agreements entered into thereunder are not to be exceptions to the general immunity provisions of the ICA.

Finally, the court of appeals' decision, if not reversed, will seriously impede the attainment of this nation's Congressionally established transportation policy to foster and encourage the consolidation of rail carriers. As this Court has previously declared, Congress provided that, with respect to rail mergers found by the Commission to be in the public interest, the ICA is to be the "supreme law of the land";[20] all legal obstacles from any source must give way in order to ensure that such transactions can be carried out. The court of appeals' decision, however, elevates legal obligations flowing from rail collective bargaining agreements and the RLA to positions of primacy, effectively giving rail labor a veto power over the accomplishment of ICC-approved rail consolidations, despite the six-year income protection and relocation benefits provided to employees by statute. In doing so, the court of appeals ignored Congress' manifest intent.

ARGUMENT

I. The Court of Appeals' Decision, Interpreting the ICA Immunity Provisions, Is Contrary to Prior Decisions of this Court

The court of appeals cited no judicial precedent for its blanket conclusion that § 11341(a) does not give the ICC authority to override collective bargaining agreements even where necessary to implement an approved rail consolidation. In doing so, it ignored both controlling and instructive decisions of this Court.

This Court has previously ruled that the rail consolidation provisions of the Transportation Act of 1920, in

[20] *Schwabacher*, 334 U.S. at 198.

which the precursor of § 11341(a) was first enacted, "are to be given liberal construction in aid of the purposes Congress had in mind." *Escanaba & L. S. R.R. v. United States*, 303 U.S. 315, 320 (1938). In keeping with this admonition, this Court has already determined that the ICA immunity provisions free consolidating carriers from obligations arising out of contracts that would otherwise impede a transaction found to be in the public interest.

In *Schwabacher v. United States*, 334 U.S. 182, 188, 199 (1948), this Court considered whether the ICC had authority under ICA § 5(11), § 11341(a)'s predecessor, to supersede "contract rights" flowing from a rail corporation's charter.[21] Certain shareholders of the Pere Marquette Railway Company argued that the ICC was

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[21] While this Court referred in *Schwabacher* to the shareholders' rights under Michigan law, it was clear that the source of such rights was not a state statute (a "positive enactment" in the vernacular of the court of appeals below) but the "promises" contained in Pere Marquette's corporate charter, a contract. *See* 334 U.S. at 199. *See also* Motion of the United States to Affirm at 8, *Schwabacher v. United States*, 334 U.S. 182 (1948) ("[The ICC] further concluded that if dissenting stockholders had individual *contract* rights which might be asserted under state law, that was a matter not within the Commission's province to decide.") (emphasis added); Brief for the Interstate Commerce Commission at 2, *id.* (Question Presented: "Whether . . . the Commission was required . . . to adjudicate and enforce the claimed *contractual* rights, arising under State law, of dissenting shareholders. . . .")(emphasis added); *SEC v. Central-Illinois Sec. Corp.*, 338 U.S. 96, 134 (1949) (result in *Schwabacher* based on Congress' purpose to avoid shifting investment values "by maturing *contract* rights which would not otherwise have matured") (emphasis added). Accordingly, the court of appeals below erred in interpreting *Schwabacher* as reaching only "state law [that] grant[ed] dissenting stockholders right to block merger". *Brotherhood of Ry. Carmen*, 880 F.2d at 571, Pet. App. 21a.

required to protect their contractual entitlement to accrued dividends in its order approving a proposed rail merger. The Commission disclaimed jurisdiction to pass upon their claims once it had found that the merger terms were just and reasonable as to each class of stockholders.

This Court rejected both positions. It held that the Commission was obligated under the ICA to pass upon and approve all capital liabilities to be assumed by the merged company or to be discharged as a result of the merger. *Id.* at 197-98. More importantly, this Court rejected the shareholders' claim that the Commission was bound to respect and protect their contractual claims. This Court observed that, as a result of the ICA's immunity provisions now found in § 11341(a), "[i]n matters within [the ICA's] scope it is the supreme law of the land." *Id.* at 198. Thus, the sole source of rights possessed by the shareholders was the ICA itself and its requirement that the merger terms be "just and reasonable." *Id.* at 198-99. In making such a determination, the Commission was to consider only the value of a shareholder's contribution to the merger, "not the promise that a charter made to him". *Id.* at 199.[22]

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[22] This Court had established long before *Schwabacher* that ICC rail line abandonment orders supersede inconsistent provisions in state rail charters as a result of the commerce clause, even in the absence of express immunity language such as that found in § 11341(a). *See Texas v. United States*, 292 U.S. 522, 531 (1934) ("Even explicit charter provisions must yield to the paramount regulatory power of the Congress."); *Colorado v. United States*, 271 U.S. 153, 165 (1926) (*semble*); *New York v. United States*, 257 U.S. 591, 601 (1922) (*semble*).

In the court below BRC claimed that the ICC's actions amounted to a "taking" of its members' property in violation of the Fifth Amendment. The court of appeals did not reach

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Accordingly, this Court's rationale in *Schwabacher* establishes that obligations flowing from collective bargaining agreements (even if artificially divorced from the RLA, as the court of appeals would have it; *see* discussion *infra* at 24-29), like the claimed contract rights of the Pere Marquette shareholders, cannot stand in the way of the implementation of a rail consolidation found by the ICC to be in the public interest as a result of the ICA immunity provisions in § 11341(a).[23]

This Court has also considered the impact of ICC consolidation approvals on obligations arising out of collective bargaining agreements. Prior to the enactment of the Transportation Act of 1940, the Commission had

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this issue. *Brotherhood of Ry. Carmen*, 880 F.2d at 574; Pet. App. 26a. This Court has long recognized that contracts that deal with a subject matter appropriately regulated by the federal government under the commerce power may be superseded without violating the Fifth Amendment. *See, e.g., Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986); *Norman v. Baltimore & O. R.R.*, 294 U.S. 240, 307-11 (1935); *New York v. United States*, 257 U.S. at 601; *Louisville & N. R.R. v. Mottley*, 219 U.S. 467, 480-82 (1911); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 230 (1899).

[23] *See also Altman v. Central of Georgia Ry.*, 488 F.2d 1302, 1305-07 (D.C. Cir. 1973) (contractual entitlement to dividends under rail corporation's charter does not survive ICC approval of rail consolidation); *Mississippi River Fuel Corp. v. Slayton*, 359 F.2d 106, 113 (8th Cir. 1966) (Blackmun, J.) (charter provisions "must give way" unless recognized by ICA), *rev'd on other grounds sub nom. Levin v. Mississippi River Fuel Corp.*, 386 U.S. 162 (1967); *City of Palestine, Texas v. United States*, 559 F.2d 408, 413-14 (5th Cir. 1977) (assuming, but not deciding, that ICC has authority under immunity provision to abrogate private contract requiring railroad to maintain facilities in Palestine, Texas), *cert. denied*, 435 U.S. 950 (1978).

imposed labor conditions on consolidating carriers to protect the incomes of affected employees in *Chicago, R.I. & G. Ry. Trustees Lease, 230 I.C.C. 181 (1938)*. This Court upheld the Commission's inherent authority under the ICA to impose such conditions in *United States v. Lowden*, 308 U.S. 225 (1939). In so doing, this Court recognized that such income protections were necessary and proper in view of the fact that employees otherwise would inevitably suffer adverse effects from such transactions, including the loss of contractual seniority rights:

> Not only must unification result in wholesale dismissals and extensive transfers, involving expense to transferred employees, *but in the loss of seniority rights* which, by common practice of the railroads are restricted in their operation to those members of groups who are employed at specified points or divisions.

308 U.S. at 233; emphasis added. Significantly, nowhere in *Lowden* did this Court even suggest that carriers could only override contractual seniority provisions through the bargaining processes of the RLA. This Court's implicit recognition that such contract rights were overridden as a result of ICC approval of a rail consolidation is inconsistent with and mandates reversal of the decision of the court of appeals.[24]

In addition, four members of this Court have previously declared that an ICC consolidation order supersedes inconsistent provisions in RLA collective bargaining agreements as a result of § 11341(a). In *ICC v.*

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[24] *See also Railway Labor Exec's' Ass'n v. United States*, 339 U.S. 142, 147 (1950) (noting awareness prior to 1940 Act's passage that economies flowing from rail consolidations "could be realized only at the expense of displaced railroad labor").

Brotherhood of Loc. Eng'rs, 482 U.S. 270 (1987), the union argued that its members had rights under the RLA *and their collective bargaining agreements* to perform certain work and that those rights were violated by an ICC trackage rights order that approved other labor arrangements. *Id.* at 295. The railroads responded that they were immune from complying with these agreement terms and the RLA as a result of § 11341(a). A panel of the D.C. Circuit ruled that the Commission was required to make explicit findings of "necessity" before the immunity provision would apply. *Brotherhood of Loc. Eng'rs v. ICC*, 761 F.2d 714, 723 (D.C. Cir. 1985).[25]

The majority in this Court did not reach this issue, ruling that the D.C. Circuit had lacked jurisdiction over the union's petition for administrative review. 482 U.S. at 277-87. Justice Stevens, in a concurring opinion joined by Justices Brennan, Marshall, and Blackmun, however, would have reached the merits and would have reversed the D.C. Circuit on the ground that the immunity provisions of the ICA are self-executing and do not depend on any explicit "necessity" findings. 482 U.S. at 298. Significantly, these Justices did not even intimate that § 11341(a) does not encompass obligations arising out of collective bargaining agreements in the rail industry.[26]

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[25] In so ruling, the D.C. Circuit implicitly held that the ICC had the statutory authority to immunize rail carriers from compliance with the RLA and obligations arising out of collective bargaining agreements, so long as it made express findings of the "necessity" for such immunity.

[26] As Justice Stevens' concurring opinion noted, the breadth of the exemption conferred by § 11341(a) "is defined by the scope of the approved transaction." *ICC v. Brotherhood of Loc. Eng'rs*, 482 U.S. at 298. In this case, the ICC determined

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Schwabacher's holding that the immunity provisions now found in § 11341(a) of the ICA encompass contractual obligations, such as obligations flowing from RLA collective bargaining agreements, is firmly supported by the plain terms of the statute, its detailed legislative history, and the significant public policies that underlay its enactment. It is to each of these that we now turn.

II. The Plain Terms of § 11341(a) Immunize Rail Carriers from Obligations in Collective Bargaining Agreements that Impede an ICC-Approved Rail Consolidation

This Court has often declared that the starting point for interpreting a statute is the language itself. "If the statute is clear and unambiguous 'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' " *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986) (*quoting Chevron U.S.A. Inc.*, 467 U.S. at 842-43); *see also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988). Congress has repeatedly plainly stated its intention that the immunity provisions governing rail consolidations in the ICA apply to all legal obstacles and restraints, regardless of their source.

The current version, ICA § 11341(a), unambiguously relieves consolidating carriers from "the antitrust laws and from *all other law, including State and municipal law*" in order to permit those carriers to implement a consolidation found to be in the public interest. Thus, regardless of

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that the Waycross/Raceland shop consolidation was within the authority it had conferred on the carriers in *CSX – Control*. *See* n.16, *supra*. The court of appeals did not disturb this finding.

the source – federal, state, or local – Congress has decreed that all legal obstacles to the accomplishment of an approved transaction are swept aside as a result of that section's terms.[27]

The antecedents to this immunity provision confirm the breadth of the section's reach. Section 11341(a) originated in the Transportation Act of 1920. Section 5(8) of the ICA, added by § 407 of the 1920 Act, broadly relieved consolidating carriers from *"all other restraints or prohibitions by law, State or Federal."* 41 Stat. 480; Pet. App. 118a. This provision was reworded when the consolidation section of the ICA was revised in Title II, § 202 of the Emergency Railroad Transportation Act of 1933 ("ERTA"), ch. 91, 48 Stat. 217 *et seq.* The immunity conferred on consolidating carriers was contained in renumbered ICA § 5(15), which relieved such railroads from *"all other restraints or prohibitions by or imposed under authority of law, State or Federal."* 48 Stat. 219; Pet. App. 119a. The Transportation Act of 1940 further modified the immunity language, relocated to ICA § 5(11), to relieve merging carriers from *"all other restraints, limitations, and prohibitions of law, Federal, State, or municipal."* 54 Stat. 908-09; Pet. App. 119a-120a. The simplification of this provision,

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[27] The plain language of § 11341(a) establishes that it was intended to encompass obligations arising under federal law beyond the restrictions found in the anti-trust laws. *See Texas v. United States*, 292 U.S. at 534 (rejecting argument that immunity was limited to restraints "which fall within the general description of 'anti-trust' legislation"); *see also Southern Pac. Transp. Co. v. ICC*, 736 F.2d 708, 721 n.10 (D.C. Cir. 1984) (§ 11341(a) exempts carrier from obligations under the Pacific Railroad Acts, 45 U.S.C. § 83 (1982)), *cert. denied*, 469 U.S. 1208 (1985).

currently found in § 11341(a), that occurred during the general recodification of the ICA in 1978[28] was not intended to result in any substantive change. *See ICC v. Brotherhood of Loc. Eng'rs*, 482 U.S. at 299 n.12 (Stevens, J., concurring); *see also* H.R. Rep. No. 95-1395, 95th Cong., 2d Sess. 158-60 (1978); *Trailer Marine Trans. Corp. v. FMC*, 602 F.2d 379, 383 n.18, 384 (D.C. Cir. 1979).

Despite the breadth of the immunity language, the court of appeals ruled that Congress' failure to include an express reference to "contracts" or collective bargaining agreements in 1920 or in any of the section's later versions meant that Congress intended to immunize carriers only from "laws": "positive enactments, not common law rules of liability, as on a contract." *Brotherhood of Ry. Carmen*, 880 F.2d at 567, 570; Pet. App. 12a, 18a. This artificially narrow interpretation – that Congress intended to encompass only "statutes" and other "positive enactments" – cannot be squared with the words Congress actually used.

Congress' consistent reference in the immunity provision since 1920 to "law" demonstrates the intended breadth of its reach. As this Court has previously observed, "The term law in our jurisprudence includes the rules of court decisions as well as legislative acts." *Warren v. United States*, 340 U.S. 523, 526 (1951).[29] Congress

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[28] Pub. L. No. 95-473, § 3(a), 92 Stat. 1466.

[29] Indeed, in broadly defining the immunity granted consolidating carriers, Congress was presumably mindful of *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899), where this Court had recognized that "private contracts may in truth be as far reaching in their effect upon interstate commerce as would the legislation of a single State of the same character." *Id.* at 229-30. In *Addyston Pipe* this Court soundly

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clearly intended to free carriers from legally enforceable restraints and prohibitions arising from any source, not simply those flowing from federal, state, or local legislative action.[30] The court of appeals' distinction between statutory and other legally enforceable restraints, such as those arising from a contract, is not only contrary to the express terms used by Congress but is inconsistent with this Court's repeated recognition that, "[o]nce courts enforce [an] agreement, the sanction of government is, of course, put behind them." *Railway Employes' Dep't v. Hanson*, 351 U.S. 225, 232 n.4 (1956) (*citing Shelley v. Kraemer*, 334 U.S. 1 (1948); *Hurd v. Hodge*, 334 U.S. 24 (1948); and *Barrows v. Jackson*, 346 U.S. 249 (1953)).

Moreover, the court of appeals' analysis was premised on an unprecedented fundamental flaw of reasoning:

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rejected the contention that the power of Congress to regulate under the Commerce Clause did not permit interference with private contracts but only reached "acts of interference by state legislation or by means of regulations made under the authority of the State by some political subdivision thereof". *Id.* at 227.

[30] Congress' intent in 1920 that the phrase "other restraints or prohibitions by law, State or Federal" in ICA § 5(8) reach beyond state regulatory statutes was further demonstrated by the fact that Congress provided in ICA § 5(6)(c) that, after the ICC had issued an order approving a rail consolidation, "such consolidation may be effected, in accordance with such order, if all the carriers involved assent thereto, *the law of any State or the decision or order of any State authority to the contrary notwithstanding.*" 41 Stat. 480; emphasis added. Had Congress intended to immunize consolidating carriers only from affirmative state enactments, the broad reference to prohibitions "by law" in § 5(8) would have been superfluous in light of § 5(6)(c).

the court considered § 11341(a)'s application to obligations contained in collective bargaining agreements as somehow separate from the effect of that section on rights and obligations arising directly from the Railway Labor Act. *Brotherhood of Ry. Carmen*, 880 F.2d at 567, 570; Pet. App. 12a, 19a.

In fact, however, as this Court has repeatedly declared, collective bargaining agreements in the rail industry are purely creatures of the Railway Labor Act, 45 U.S.C. §§ 151-188 (1982). The RLA ordinarily provides the exclusive means for the enforcement and modification of obligations contained within such agreements. *See, e.g., Detroit & T. S. L. R.R. v. United Transp. Union*, 396 U.S. at 156 (RLA § 2 Seventh, 45 U.S.C. § 152 Seventh, "operates to give legal and binding effect to collective agreements"); *Chicago & N. W. Ry.*, 402 U.S. at 576-78 (RLA § 2 First, 45 U.S.C. § 152 First, creates legally enforceable obligation to "make and maintain" agreements); *Andrews v. Louisville & N. R.R.*, 406 U.S. 320, 323 (1972) (an RLA agreement is " 'a federal contract and . . . therefore governed and enforceable by federal law,' " *quoting International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 692 (1963)); *Railway Employes' Dep't v. Hanson*, 351 U.S. at 232 ("A union agreement made pursuant to the Railway Labor Act has . . . the imprimatur of the federal law upon it. . . ."). Indeed, as creatures of the RLA – a federal law – rail collective bargaining agreements have been held to supersede inconsistent provisions of state law under the Supremacy Clause. *See California v. Taylor*, 353 U.S. 553, 561 (1957) (RLA collective bargaining agreement with state-owned railroad takes precedence over contrary state civil service law).

Moreover, prior to the court of appeals' decision herein, at least four courts of appeals had ruled that an

ICC-authorized consolidation supersedes both inconsistent terms in collective bargaining agreements and the provisions of the RLA, from which they originate, as a result of the ICA immunity provisions in § 11341(a). In doing so, none of these courts has drawn the distinction relied upon by the court of appeals in this case. Each has ruled that the ICA immunity provisions encompass collective bargaining agreements and other RLA-based obligations alike.

In the seminal decision in *Brotherhood of Loc. Eng'rs v. Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963), the Eighth Circuit rejected union arguments that a carrier was required to comply with the RLA bargaining procedures to modify collective bargaining agreement seniority terms that otherwise would have prevented it from rearranging its forces after an ICC-approved merger, holding that the dispute resolution procedures contained in the labor conditions approved by the Commission occupied the field as a result of the immunity provisions of the ICA. "[T]he ICC['s] power to authorize mergers would be completely ineffective if authority to adjust work realignments through fair compensation did not exist." *Id.* at 430. The Eighth Circuit concluded, " 'A private contract must yield to the paramount power of the [Commission] to perform its duties under the statute creating it to approve mergers. . . .' " *Ibid.* (*quoting Kent v. CAB*, 204 F.2d 263, 266 (2d Cir.), *cert. denied*, 346 U.S. 826 (1953)).

The Seventh Circuit has also ruled that the ICA immunity provisions supersede the RLA and collective bargaining agreements. *Burlington N., Inc. v. American Ry. Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974) (ICC-approved merger protection agreement found not to be

inconsistent with RLA but "if it were its provisions would be controlling"), *cert. denied*, 421 U.S. 975 (1975). The Sixth Circuit similarly has acknowledged the necessity for supplanting bargaining agreements and the RLA in an ICC-authorized transaction in *Nemitz v. Norfolk & W. Ry.*, 436 F.2d 841, 845 (6th Cir.) (ICC's authority to effectuate mergers would be "rendered ineffective if authority to adjust work realignments through fair compensation did not exist"), *aff'd on other grounds*, 404 U.S. 37 (1971).[31]

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[31] *See also Railway Labor Exec's' Ass'n v. Guilford Transp. Indus., Inc.*, 667 F. Supp. 29, 35 (D. Me. 1987), *aff'd per curiam*, 843 F.2d 1383 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 3213 (1989); *Brotherhood of Loc. Eng'rs v. Boston & Maine Corp.*, 788 F.2d 794, 800-01 (1st Cir.) ("ICC has the power to approve a transaction and exempt its participants from legal obstacles that would impede its fruition", including the bargaining procedures of the RLA), *cert. denied*, 479 U.S. 829 (1986); *Burlington N. R.R. v. United Transp. Union*, 848 F.2d 856, 863 (8th Cir.) ("When the ICA provides a specific exemption from all other law and mandates inescapable employee protective conditions under provisions such as 49 U.S.C. §§ 11341(a), 11347, it effectively supersedes . . . the RLA. . . ."), *cert. denied*, 109 S. Ct. 1130 (1988); *Missouri Pac. R.R. v. United Transp. Union*, 782 F.2d 107, 111 (8th Cir. 1986) ("MOPAC is exempted under § 11341(a) of the Interstate Commerce Act . . . from the requirements of the Railway Labor Act (RLA) with respect to major disputes"), *cert. denied*, 482 U.S. 927 (1987); *Bundy v. Penn Cent. Co.*, 455 F.2d 277, 279-80 (6th Cir. 1972); *United Transp. Union v. Norfolk & W. Ry.*, 332 F. Supp. 1170, 1174 (N.D. Ohio 1971).

Indeed, for almost four decades the courts have similarly ruled that the Civil Aeronautics Board in airline mergers had the authority to supersede both the RLA bargaining procedures and collective bargaining agreement provisions that interfered with the merger, even in the absence of express statutory language comparable to § 11341(a). *International*

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Finally, the ICC has repeatedly held that, as a result of the immunity provisions of the ICA, its labor protective conditions and the terms of implementing agreements established thereunder supersede both the bargaining procedures of the RLA and collective bargaining agreement terms that would otherwise impede an approved rail consolidation.[32] The court of appeals erred

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Ass'n of Machinists v. Northeast Airlines, Inc., 536 F.2d 975, 977 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976); *International Ass'n of Machinists v. Northeast Airlines, Inc.*, 473 F.2d 549, 559-60 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972); *Kesinger v. Universal Airlines, Inc.*, 474 F.2d 1127, 1131-32 (6th Cir. 1973); *American Airlines v. CAB*, 445 F.2d 891, 896 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972); *Kent v. CAB*, 204 F.2d 263, 265-66 (2d Cir.), *cert. denied*, 346 U.S. 826 (1953).

Subsequent to the court of appeals' decision herein, another panel of the D.C. Circuit and an Eighth Circuit panel, both in *dicta*, have cited the holding of the instant case without further analysis. *See Railway Labor Exec's' Ass'n v. ICC*, 883 F.2d 1079, 1082 (D.C. Cir. 1989); *Brotherhood of Loc. Eng'rs v. ICC*, 885 F.2d 446, 449 (8th Cir. 1989).

[32] *See, e.g., Maine Central, supra* n. 13; *Denver & R. G. W. R.R., supra* n.13; *Norfolk & W. Ry. – Merger*, 347 I.C.C. 506, 511-12 (1974).

The Commission has similarly ruled that its approval of a rail consolidation overrides inconsistent provisions in other types of agreements. *See, e.g., Missouri P. R.R. – Merger – Texas & P. Ry.*, 348 I.C.C. 414, 430 (1976), *rev'd sub nom. City of Palestine, Texas v. United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978), and cases cited therein (Commission has authority to relieve carriers from contractual obligations in consolidation proceedings under ICA). The court of appeals misinterpreted the Commission's decision in *Gulf, M. & O. R.R. – Abandonment*, 282 I.C.C. 311 (1952), as indicating that the Commission does not believe it is empowered to override private contracts. *Brotherhood of Ry. Carmen*, 880 F.2d

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in refusing to accord the Commission's interpretation of its governing statute the "considerable weight" to which it is entitled. *Chevron U.S.A., Inc.*, 467 U.S. at 844-45.

Accordingly, obligations flowing from collective bargaining agreements in the rail industry can interfere with, or impede carriers from carrying out, ICC-approved consolidations solely because such obligations have their genesis in, and can ordinarily only be changed through the "virtually endless" processes of, the RLA, a federal "law" within the meaning of ICA § 11341(a). As a result, the court of appeals' conclusion that that section does not reach restraints or prohibitions arising out of such agreements is clearly contrary to § 11341(a)'s plain terms.

III. The Legislative History of the ICA's Immunity Provisions Establishes that Congress Intended to Encompass Obligations Arising from Rail Collective Bargaining Agreements

The court of appeals stated that it found no support in the legislative history of the ICA immunity provisions for ICC's position that obligations arising from rail collective bargaining agreements were encompassed therein.

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at 567; Pet. App. 13a. *Gulf* was an abandonment proceeding, to which the immunity provisions of the ICA's consolidation chapter do not apply. In fact, as the ICC explained therein, it is empowered to set aside "vested rights of other parties . . . upon a clear grant of statutory authority similar to that contained in Section 5(11) [now § 11341(a)]." *Gulf*, 282 I.C.C. at 335. *But see Brandywine Valley R.R. – Purchase – CSX Transp., Lines in Florida*, 5 I.C.C. 2d 764, 772 n.5 (1989), where the Commission, following the remand from the D.C. Circuit in the instant case, stated that it "[did] not dispute the limited holding" of the court of appeals.

Brotherhood of Ry. Carmen, 880 F.2d at 568-70; Pet. App. 18a-19a. The court focused its attention exclusively on the enactments of the Transportation Act of 1920 and the Railway Labor Act, passed in 1926. As shown below, the court misconstrued the very legislative history it surveyed. More importantly, however, the court ignored the probative legislative history of the Emergency Railroad Transportation Act of 1933, where Congress expressly excepted obligations flowing from the RLA and rail collective bargaining agreements from the immunity provisions of the ICA *on a temporary basis*, while rejecting the inclusion of such an exception in the permanent ICA. The court also ignored the Transportation Act of 1940, where Congress rejected similar proposals to except collective bargaining agreements from § 11341(a)'s predecessor. This history confirms that Congress intended § 11341(a) to encompass obligations arising from collective bargaining agreements.

A. The Transportation Act of 1920

The court of appeals correctly observed that the witnesses and Congressmen who addressed the immunity provisions that were enacted in the Transportation Act of 1920 were primarily concerned with freeing consolidating railroads from restraints flowing from the federal antitrust laws and state regulatory statutes. *Brotherhood of Ry. Carmen*, 880 F.2d at 568-70; Pet. App. 13a-18a.[33] There was

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[33] *See, e.g., Hearings on H.R. 4378 Before the House Comm. on Interstate and Foreign Commerce*, 66th Cong., 1st Sess., pt. 7, 1103 (1919) (testimony of George Post, Chairman of U.S. Chamber of Commerce Railroad Committee); *Hearings on Extension of Tenure of Government Control of Railroads Before the Senate Comm. on*

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no discussion directly concerning the effects of the broad language enacted in ICA § 5(8) on contracts or other common law obligations, much less on contractual obligations arising between rail carriers and rail unions.[34]

Congress' silence in this regard provides no support for the conclusion that Congress intended to exempt

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Interstate Commerce, 65th Cong., 3d Sess., pt. 1, 110-13 (1919) (testimony of William G. McAdoo, Director General of Railroads); *id.*, pt. 2, 327 (testimony of Thomas DeWitt Cuyler); *id.*, pt. 3, 517-20, 537-51 (testimony of Alfred P. Thom, General Counsel of Association of Railway Executives); 58 Cong. Rec. 8310 (1919) (Rep. Esch).

[34] However, the Senate Committee on Interstate Commerce, which held hearings in 1919 concerning legislation to end the government's control of the railroads, ordered the transcript of hearings held in 1916 and 1917 before the Joint Congressional Committee on Interstate and Foreign Commerce to be reprinted as an appendix to the 1919 hearing transcript. In 1916, Alfred P. Thom, Counsel to the Railroad Executives' Committee, testified concerning a proposal to create federal corporations to own the railroads and the contract rights of stockholders and creditors that would be affected thereby. Mr. Thom referred to this Court's decision in *Louisville & N. R.R. v. Mottley*, 219 U.S. 467 (1919), and concluded, "[T]here could not be a contract right acquired by one of the investors in these railroads chartered to do an interstate business which would limit the power of the Federal government to fully regulate that instrumentality. . . . They . . . took their rights subject to the future exercise by Congress of that power to regulate commerce to the fullest extent that Congress might feel that the public interest might demand. . . . [W]hen the bondholder lent his money to a railroad engaged in interstate commerce, then ex necessitati they both did that subject to any legitimate regulation of commerce in the future which Congress might undertake." *Hearings on Extension of Tenure of Government Control of Railroads, supra*, Appendix at 172-73.

collective bargaining agreements or labor law obligations from the broad sweep of the 1920 Act's immunity provisions. Indeed, in Title III of the 1920 Act, Congress enacted machinery to resolve "Disputes between Carriers and their Employees and Subordinate Officials", the immediate forerunner to the RLA. 1920 Act, Title III, §§ 300-16, 41 Stat. 469-74.[35] Significantly, however, Congress did not except this labor relations statute from the all-encompassing immunity provisions of the ICA – superseding "all . . . restraints or prohibitions by law, State or *Federal*" – that it enacted in Title IV, § 407 of the 1920 Act. Had Congress intended to except federal rail labor relations obligations from the reach of ICA § 5(8), it could easily have done so.[36]

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[35] The labor relations provisions of the 1920 Act proved to be "highly unsatisfactory", thus leading to the passage of the RLA six years later. *International Ass'n of Machinists v. Central Airlines*, 372 U.S. at 687; *see also International Ass'n of Machinists v. Street*, 367 U.S. 740, 757 n.12 (1961).

[36] In sharp contrast, when Congress intended to except obligations flowing from collective bargaining agreements from the ICA immunity provisions, it clearly expressed such an intent. *See* the Emergency Railroad Transportation Act of 1933, discussed *infra* at pp. 39-42. *Cf. NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 279 (1974) (holding that managerial personnel are not "employees" under the National Labor Relations Act, which is silent on the subject, on grounds that, "where Congress desired to include managerial or supervisory personnel in the category of employees, it did so expressly," citing the RLA as an example).

B. The Railway Labor Act

The Railway Labor Act, enacted in 1926 (ch. 347, 44 Stat. 577-87, *codified at* 45 U.S.C. §§ 151-188 (1982)), was the product of an historic agreement between representatives of the major railroads and major rail labor unions. *See Chicago & N.W. Ry.*, 402 U.S. at 576; *International Ass'n of Machinists v. Street*, 367 U.S. at 758; *Texas & N.O. R.R. v. Brotherhood of Ry. Clerks*, 281 U.S. 548, 563 (1930).

There was little discussion of the relationship between the RLA and the ICA, as amended only six years earlier in the Transportation Act of 1920, during the congressional hearings or debates. Significantly, at no time during these proceedings did any senator or representative suggest that the RLA or collective bargaining agreements arising thereunder would not be among those "restraints or prohibitions by law, State or Federal" encompassed within the broad immunity provisions then found in ICA § 5(8). Thus, there was no suggestion that carriers that were authorized to consolidate by the ICC could not be relieved of compliance with obligations arising under the RLA or such agreements. Nor did the RLA, as enacted and as subsequently amended, contain any such provision.

The court of appeals nevertheless purported to find "a healthy respect for privately negotiated contracts" in two aspects of the legislative history of the RLA. *Brotherhood of Ry. Carmen*, 880 F.2d at 570; Pet. App. 18a. First, the court correctly noted that several congressmen questioned the constitutionality of a proposed amendment that would have allowed the ICC to set aside wage agreements. *See, e.g.*, Subcommittee on Labor of the Senate

Committee on Labor and Public Welfare, 93rd Cong., 2d Sess., *Legislative History of the Railway Labor Act, as Amended (1926 through 1966)* 539, 550, 559-60 (1974) (hereinafter *"RLA Legislative History"*) (Sen. Wheeler). But the supporters of such a provision sharply disputed this conclusion. *See, e.g., id.* at 539 (Sen. Curtis), 550 (Sen. Underwood). No consensus was reached. This dispute sheds no light whatsoever on whether Congress intended the RLA *sub silentio* to overrule the broad immunity provisions in the consolidation section of the ICA, adopted only six years earlier.

Second, the court quoted out of context a portion of the Senate report on the bill that became the RLA, in which the committee members expressed "fundamental objection to making changes of a substantive nature in the agreement which the parties had reached". *Brotherhood of Ry. Carmen*, 880 F.2d at 570; Pet. App. 18a. The reference in S. Rep. No. 606, 69th Cong., 1st Sess. 6 (1926), to the "agreement" is not, as the court implied, to rail collective bargaining agreements but to the proposed bill itself. *See International Ass'n of Machinists v. Street*, 367 U.S. at 758; *Texas & N.O. R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 563 n.2 (1930); *see also* H.R. Rep. No. 328, 69th Cong., 1st Sess. 1 (1926) (emphasis added) ("[The bill] represented the *agreement* of railway managements operating over 80 per cent of the railroad mileage and labor organizations representing an overwhelming majority of the railroad employees."). *See generally Railway Employes' Dep't v. Hanson*, 351 U.S. at 240 (Frankfurter, J., concurring).

Accordingly, nothing in the RLA or its legislative history indicates that Congress intended that act, or collective bargaining agreements arising thereunder, to be

exempted from the immunity provisions of the ICA. Indeed, the absence of an affirmative exception for such obligations must reflect Congress' general understanding that the passage of the RLA did not modify the authority conferred under the ICA in the Transportation Act of 1920.

C. Unsuccessful Efforts to Amend the ICA (1928-1930)

Legislative efforts by rail labor in the years immediately following the enactment of the RLA further demonstrate that the RLA's passage did not limit the immunity conferred by the ICA on consolidating rail carriers.

In 1928 Congress considered, but did not enact, legislation to change the ICA's consolidation provisions. The rail labor representative who participated in those proceedings informed the House Committee on Interstate and Foreign Commerce of a resolution adopted by the Brotherhood of Railroad Trainmen ("BRT") calling upon Congress to require that "carriers be consolidated in such a manner that will safeguard to the greatest extent the seniority, contractual and other rights of the employees on the properties." The resolution noted that BRT had collective bargaining agreements with approximately 215 railroads and terminal companies and that these agreements covered working conditions, rates of pay, and seniority rights. The resolution stated, "[I]t is necessary that in any consolidations these agreements shall not be invalidated" and that "[i]t would be a serious mistake to permit any consolidations which would in any way take from our men seniority earned, in many instances, by a lifetime of employment." *Hearings on H.R. 5641 Before the House Comm. on Interstate and Foreign Commerce*, 70th

Cong., 1st Sess. 336-37 (1928). The resolution contained no reference to the RLA and no suggestion that carriers could implement ICC-approved consolidations only after modifying the seniority terms and other provisions in collective bargaining agreements through the RLA bargaining procedures. Indeed, implicit in the resolution was the recognition that carriers could engage in consolidation transactions without regard to the provisions in collective bargaining agreements as a result of the immunity provisions of the ICA.

In April, 1930, at the outset of the Depression, the Senate considered a joint resolution that would have suspended the authority of the ICC to approve rail consolidations or unifications. The proposed resolution noted that rail consolidations and unifications "inevitably . . . result in losses of employment to railroad employees" and would have prohibited such transactions until permanent legislation could be enacted, *inter alia*, "to check unnecessary uncompensated losses to rail employees." *Hearings on S.J. Res. 161 Before the Senate Comm. on Interstate Commerce*, 71st Cong., 2d Sess. 2 (1930) ("*1930 Hearings*").

Several rail labor witnesses testified concerning the effects prior ICC-approved consolidations had had on rail employees and the working conditions and other terms embodied in their collective bargaining agreements.[37]

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[37] For example, union chairmen on the Reading Co. System submitted a letter protesting the proposed consolidation of the Reading and the B & O:

> [I]f this merger or consolidation goes through as planned it will affect our men very seriously as it will not only change our working conditions and rules but we believe, in many cases will change our

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William N. Doak, National Legislative Representative of the BRT, presented the Senate Committee with a statement issued by the Railway Labor Executives' Association ("RLEA"), in which RLEA observed that prior consolidations had resulted in the movement and consolidation of terminals and other facilities with resulting losses of employment affecting over 200,000 employees. In an apparent reference to the RLA, the statement concluded:

> [We] have become convinced that neither existing law, nor any measures now under consideration by Congress provide adequate protection for the interests of either the users of transportation service, or the employees who furnish that service.

1930 Hearings 242. Accordingly, RLEA proposed that the ICA be amended to authorize the ICC to consider, in determining whether a proposed consolidation is in the public interest, the effects on employees and to require, as a condition of its approval, "[t]hat contractual and legal obligations to . . . employees shall be maintained".[38]

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> terminals and wipe out crews and will therefore, very materially affect men with long years of service and change our entire working conditions.

1930 Hearings 240. The letter contained no suggestion that such changes in agreements and working conditions could be effected only through the RLA bargaining procedures.

[38] Rail labor's view that the RLA did not already adequately protect employees from changes in terms and conditions of employment resulting from carrier implementation of approved consolidations was reflected in Doak's oral testimony as well. *1930 Hearings* 242. *See also* the testimony of F.H.

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Also testifying in 1930 was Donald R. Richberg, counsel for RLEA and one of the principal draftsmen of the RLA, only four years earlier. *See Chicago & N.W. Ry.*, 402 U.S. at 576 (noting that Richberg's statements concerning the RLA "are entitled to great weight in the construction of the Act"). Richberg reported that carriers had unilaterally implemented operational changes having significant effects on rights arising under collective bargaining agreements in connection with ICC-authorized consolidations:

> [N]ow we face the consolidation issue, in connection with which we find there is going to be great dislocation of employees – the moving and shifting of men and of homes, which in many instances destroys the seniority privilege which has been built up over a period of years, a privilege which is of value to the men and this tends to disorganize the morale of the forces.

1930 Hearings at 437-38. Nevertheless, at no point during his extended testimony did Richberg assert that such changes had violated the RLA or that carriers could implement such changes only after complying with the RLA bargaining procedures to change collective bargaining agreements. Senate Joint Resolution 161 did not pass.[39]

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Wilson, on behalf of the Order of Railroad Conductors, and C.W. Barlow, on behalf of the Brotherhood of Railroad Trainmen, who detailed the operational changes proposed in connection with the Great Northern Pacific consolidation (including substantial shop consolidations) and the expected effects on employees. *Id.* at 261-71.

[39] As a result, the Commission continued to consider consolidation proposals under the terms of the 1920 Act. In 1932 the Commission addressed the effects of such consolidations on rail employees in *Consolidation of R.R.'s*, 185 I.C.C. 403

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Accordingly, following the passage of the RLA in 1926 neither the RLA nor collective bargaining agreements were viewed by either carriers or rail labor as standing in the way of ICC-approved consolidations. Rail union representatives recognized that carriers could be required to comply with the RLA and to observe the terms of such agreements only if the ICA immunity provisions were expressly so amended, but their efforts to obtain such an amendment were unsuccessful.

D. The Emergency Railroad Transportation Act of 1933

The disastrous effects of the Great Depression on the financial strength of the nation's railroads prompted Congress to consider emergency legislation designed to foster and encourage rail unifications and consolidations that might result in substantial operating economies and efficiencies. In the spring of 1933 both houses of Congress held hearings on bills that led to the passage of the Emergency Railroad Transportation Act of 1933 ("ERTA").

The emergency provisions of S. 1580 and H.R. 5500, as initially proposed, provided for the creation of the office of Federal Coordinator of Transportation and

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(1932). The Commission placed carriers on notice that they would be expected to address the effects of proposed consolidations on their employees and that the Commission might, in appropriate cases, impose conditions on its approval to protect rail workers. *Id.* at 427. The Commission's decision contained no suggestion, however, that carriers intending to relocate or consolidate shops in connection with such a unification were required to comply with the RLA bargaining procedures before doing so.

granted the Coordinator sweeping authority to issue orders found to be in the public interest that would require carriers to avoid unnecessary duplication of services, to permit the joint use of terminals, and to engage in needed financial reorganizations. *See Hearings on S. 1580 Before the Senate Comm. on Interstate Commerce*, 73d Cong., 1st Sess. 1-7 (1933) ("*1933 Senate Hearings*"); *Hearings on H.R. 5500 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 1st Sess. 1-7 (1933) ("*1933 House Hearings*"). In language clearly modeled after the immunity provisions of ICA § 5(8), both bills expressly provided that carriers were to be relieved from the antitrust laws "and all other restraints or prohibitions by law, State or Federal, other than such as are for the protection of the public health or safety, insofar as may be necessary to enable them" to comply with the Coordinator's orders. *See, e.g.*, S. 1580, Title I, § 10, *reprinted in 1933 Senate Hearings* 5. However, unlike ICA § 5(8), both bills contained the following exception to the general immunity provision:

> *Provided, however,* That nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or *the duties and obligations imposed* thereunder or *through contracts entered into in accordance with the provisions of said Act.*[40]

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[40] Notwithstanding this proposed language, rail labor, through Donald Richberg, vigorously opposed the proposed legislation and offered numerous suggested amendments, many of which were incorporated in the final act. Richberg proposed, *inter alia*, that Title I, § 7 of the bills be amended expressly to require carriers to comply with the RLA bargaining procedures in implementing approved consolidations. *1933 Senate Hearings* 85.

Congress ultimately adopted modified versions of a number of Richberg's proposed amendments. In particular, in Title

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This immunity provision, including the express exception for the RLA and collective bargaining agreement obligations, was enacted in Title I, § 10(a) of ERTA. 48 Stat. 215; Pet. App. 118a. Thus, Congress expressly provided that the general supersession of federal law protecting carrier compliance with Coordinator orders did not apply to the RLA "or the duties and obligations imposed . . . through contracts entered into in accordance with the provisions of said Act."

Congress amended certain of the permanent consolidation provisions of ICA § 5 in Title II of ERTA, which resulted in the renumbering of the general immunity provision from § 5(8) to § 5(15). 48 Stat. 219; Pet. App. 119a. In sharp contrast to ERTA's temporary provisions in Title I, Congress did *not* add a proviso excepting the RLA or collective bargaining agreements from the scope of the ICA's general rail consolidation immunity language.[41]

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I, § 7(e) of the act Congress reimposed the RLA on all rail carriers:

> Carriers, whether under control of a judge, trustee, receiver, or private management, shall be required to comply with the provisions of the Railway Labor Act. . . .

48 Stat. 214. Richberg's proposed language prohibiting carriers from issuing bulletins or orders changing existing contracts or working conditions without first complying in full with the RLA was not, however, enacted.

[41] Congress similarly provided in Title I, § 11 of ERTA, 48 Stat. 215, that a rail carrier consolidating under the auspices of the Federal Coordinator was not relieved from "any contractual obligation which it may have assumed, prior to the enactment of this Act, with regard to the location or maintenance of offices, shops, or roundhouses at any point." No similar

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Thus, Congress provided in ERTA that carriers would be required to comply with the RLA and obligations in collective bargaining agreements in carrying out consolidations during ERTA's emergency period[42] but that, following its expiration, rail carriers would once again be relieved of all "restraints or prohibitions by or imposed under authority of law, State or Federal" without limitation.[43] With ERTA's expiration in 1936 went the only

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exception was enacted in the permanent ICA revisions contained in ERTA Title II. In *Texas v. United States*, 292 U.S. at 534, this Court placed great weight on this distinction: "The insertion of the provision in Title I, with its restricted application, and the omission of a similar provision from Title II, indicate an intentional distinction."

[42] ERTA's emergency provisions were initially enacted for only a one-year period. 48 Stat. 217. They were subsequently extended by Presidential proclamation for two additional years into 1936.

[43] The ICC continued to consider consolidation applications that predated ERTA. In *St. Paul Bridge & Term. Ry. Control*, 199 I.C.C. 588 (1934), the Commission's Fourth Division approved the acquisition by the Chicago Great Western Railroad Company of control by lease of the properties of the St. Paul Bridge & Terminal Company and the St. Paul Union Stockyards Company. Rail union representatives appeared at the hearing and actively opposed the application. In its decision, the Commission referred to its 1932 warning in *Consolidation of Railroads* that it might impose protective conditions in appropriate cases and concluded that special protections for the seniority of affected employees should be imposed. *St. Paul Bridge*, 199 I.C.C. at 596-97. Significantly, the Commission in *St. Paul Bridge* implicitly recognized that the applicant carrier would have been able to change the seniority rights of the terminal company employees as a result of the Commission's approval of the transaction, but for the condition it imposed.

enacted savings provision for collective bargaining agreements.

E. The Transportation Act of 1940

Congress considered omnibus transportation legislation once again in 1939 and 1940, and the effects of rail consolidations on rail employees were addressed at length. H.R. 2531, supported by Federal Railroad Coordinator Eastman and introduced by Representative Clarence Lea, Chairman of the House Committee on Interstate and Foreign Commerce, included language modeled after Title I, § 10(a) of ERTA that would have expressly excepted the RLA and collective bargaining agreements from the ICA's general grant of immunity.[44] The bill ultimately passed by Congress contained no such immunity exception.

Thus, the 1940 Act made no changes of substance to the ICA immunity provisions. The ICA continued generally to immunize consolidating carriers from the antitrust laws and "all other restraints, limitations, and prohibitions of law, Federal, State, or municipal." ICA § 5(11), 54 Stat. 908-09. The exception in the immunity provision for the RLA and collective bargaining agreements reached thereunder, proposed in the Lea bill and previously

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> [44] Nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act, as amended, or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act.

H.R. 2531, § 209, *reprinted in Hearings on H.R. 2531 Before the House Comm. on Interstate and Foreign Commerce*, 76th Cong., 1st Sess., pt. 1, at 9 (1939)("1939 *House Hearings*").

adopted by Congress for a temporary period in ERTA, was not included.

Congress did enact provisions in the 1940 Act designed to protect employees affected by rail consolidations from income losses. The bill passed by the Senate and sent to the House, S. 2009, obligated the ICC, in approving rail consolidations, to impose conditions that would protect the interests of affected employees. 84 Cong. Rec. 9881 (1939). On the House floor, Rep. Vincent Harrington proposed an amendment that would have prevented the ICC from approving any rail consolidation that would result in employee layoffs or displacements or would impair the terms of existing collective bargaining agreements. The Harrington Amendment would have provided:

> That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, *or in the impairment of existing employment rights of said employees*.

84 Cong. Rec. 9882 (1939); emphasis added. The amendment was adopted by the House (*id.* at 9887) but was ultimately removed in conference.[45]

Instead, Congress in the 1940 Act obligated the ICC to impose on consolidating carriers "a fair and equitable arrangement to protect the interests of the rail employees

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[45] Because the Harrington Amendment would have prevented the ICC from approving any consolidation that would have been inconsistent with any collective bargaining agreement or that would have resulted in the displacement of any employees, it "threatened to prevent all consolidations to which it related." *Railway Labor Exec's' Ass'n v. United States*, 339 U.S. 142, 151 (1950); *see also Nemitz*, 436 F.2d at 845.

affected." ICA § 5(2)(f), 54 Stat. 906-07.[46] This obligation is now found in ICA § 11347, 49 U.S.C. § 11347. The ICC's

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[46] George M. Harrison, a member of the Committee of Six appointed by President Roosevelt to submit recommendations concerning the general transportation situation and Chairman of the RLEA, addressed the labor protection provisions of the proposed legislation in his testimony before the Senate Committee on Interstate Commerce:

> Now, we realize that to the extent there are unifications made and to the extent that they can be shown to be in the public interest, railroad labor will be adversely affected. So we say that the Interstate Commerce Commission shall have the authority – and that is in the report – to provide for reasonable provisions for the protection of labor. The Commission now has that authority, but it is disputed by the railroads. The Committee of Six agrees that labor shall be protected in those measures authorized by the Commission.
>
> . . . [W]e were of the opinion that in prescribing the protection the Commission would undoubtedly follow what seems to be generally the practice; and that is represented in an agreement that now exists between substantially all of the railroads and all of the employees' labor unions. It provides a schedule of benefits and protections.
>
> *So to that extent I think the interest of labor will be protected*, the public interest will be protected, and the opportunity to eliminate some bad situations in the railroad transportation machine will be available.

Hearings on S. 1310, S. 2016, and S. 2009 Before the Senate Comm. on Interstate Commerce, 76th Cong., 1st Sess. 34 (1939) ("*1939 Senate Hearings*"); emphasis added. Harrison made no reference in his testimony to the RLA or to any assertion by rail labor that ICC-authorized consolidations could be implemented only if collective bargaining agreements were modified through the RLA bargaining procedures. Indeed, in a colloquy with Senator Reed, Harrison acknowledged that rail labor's interests would be fully protected by the labor protection provisions of the proposed bill. *Id.* at 38.

labor protection conditions have provided unprecedented levels of income protection for employees affected by the implementation of an approved rail transaction. The *New York Dock* Conditions, which protect employees affected by CSXT's Waycross/Raceland shop consolidation, provide that employees dismissed (furloughed) as a result of such an operational change may receive up to six years of pay. *New York Dock Ry.*, 360 I.C.C. at 86. Employees displaced into lower paying positions are entitled to receive the difference between their protected rate of pay and their actual income for up to six years as well. *Ibid.* If employees are required to relocate their residences in order to retain a position following a consolidation, their moving expenses are paid by the carrier. *Id.* at 87. These protections are truly "unparalleled in American industry". D. J. Kozak, "Labor Protection in the Railroad Industry," in H. Northrup and P. Miscimarra (eds.), *Government Protection of Employees Involved in Mergers and Acquisitions* 499 (1989).

* * *

Congress has amply demonstrated that it knows how to exclude collective bargaining agreements and RLA bargaining procedures from the coverage of the ICA immunity provisions when such is its purpose. The rejection of such an exclusion from the permanent ICA provisions in Title II of ERTA and again in the 1940 Transportation Act is conclusive evidence that Congress intended obligations arising from such agreements and the RLA itself to fall within what has now become § 11341(a).

IV. The Court of Appeals' Decision Will Frustrate the Achievement of the National Transportation Policy of Fostering and Encouraging Rail Consolidations

This Court has decreed that the reach of the immunity provisions in the ICA must be determined with

reference to Congress' overriding purpose: "the promotion of economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure." *Texas v. United States*, 292 U.S. at 534-35; *see also Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118, 124-25 (1948) (ICA must be interpreted in light of Congress' purpose: "the maintenance and development of an economical and efficient railroad system.").

Since the passage of the Transportation Act of 1920, a cornerstone of this nation's transportation policy has been the facilitation and encouragement of rail consolidations. *See* S. Rep. No. 1182, 76th Cong., 3d Sess., Pt. 1, at 1, and Pt. 2, at 524 (1940). As this Court explained in *United States v. Lowden*, 308 U.S. at 232, "The policy of consolidation is so intimately related to the maintenance of an adequate and efficient rail transportation system that the 'public interest' in the one cannot be dissociated from that in the other." This purpose – "to facilitate merger and consolidation in the national transportation system" – also lay behind the sweeping revision of section 5 of the ICA in the Transportation Act of 1940 (*Brotherhood of Maint. of Way Employes v. United States*, 366 U.S. 169, 173 (1961); *County of Marin v. United States*, 356 U.S. 412, 416 (1958); *Schwabacher*, 334 U.S. at 193-94), and the reforms to the ICC's consolidation procedures enacted in the Rail Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), Pub. L. No. 94-210, 90 Stat. 31. *See* S. Rep. No. 94-499, 94th Cong., 2d Sess. 20 (1975).

The uniform decisions of the courts and the Commission, which have acknowledged the Commission's authority to supersede collective bargaining agreements and the bargaining procedures of the RLA in order to ensure that Commission-approved transactions can be

implemented, are consistent with this established Congressional policy. These decisions have recognized that in appropriate cases it may be necessary to supersede agreement provisions that would otherwise stand in the way of the implementation of rail consolidations found to be in the public interest and that requiring compliance with the bargaining procedures of the RLA would, as a practical matter, prevent those transactions. *See, e.g., Brotherhood of Loc. Eng'rs v. Chicago & N. W. Ry.*, 314 F.2d at 431 (RLA, if it were applicable, would "threaten to prevent many consolidations" because under RLA "it is possible for either party to completely block any change in working conditions"); *Nemitz*, 436 F.2d at 845 (*semble*); *see also* T. Murray, "A New Look at Rail Employee Protection, Norfolk & Western R.R. v. Nemitz: An Appraisal," 24 Case W. Res. L. Rev. 103, 125 (1972). Rail employees affected by such transactions have, instead, been provided with statutory income protection benefits of unparalleled generosity. *See* pp. 44-46, *supra*.[47]

The court of appeals' decision below, on the other hand, gave no consideration to this national transportation policy and, instead, elevated rail labor's interests in enforcing its members' rights under collective bargaining agreements to a position of primacy over the interests of all other members of the public (shippers, consumers, connecting railroads, etc.) in seeing that mergers and consolidations that will result in demonstrated economies and efficiencies are promptly accomplished. As a result of

[47] In addition, Orange-Book protected carmen who move from Waycross to Raceland retain their contractual entitlement to income protection for the remainder of their working lives. *See* nn.13, 18, *supra*.

this decision, rail carriers such as CSXT may be obligated to exhaust the "virtually endless" RLA bargaining procedures in order to make changes in collective bargaining agreements that will inevitably be required to merge seniority rosters and to transfer work and needed employees across former corporate boundaries, as was the case with the Waycross/Raceland shop consolidation. And, because the RLA does not require arbitration to resolve such bargaining disputes, the carriers will ultimately be faced with a strike if no agreement can be reached. *See* n.6, *supra*.

The decision of the court below has given rail labor – alone among all the constituencies whose interests are to be considered in determining whether a proposed consolidation is consistent with the public interest (ICA § 11344(b)(1)) – a virtual veto over all rail carrier consolidations. Like the Harrington Amendment, rejected by Congress during deliberations over the Transportation Act of 1940, the decision of the court of appeals "threaten[s] to prevent all consolidations." *Railway Labor Exec's' Ass'n v. United States*, 339 U.S. at 151. This is contrary to the clear intent of Congress, as embodied in the plain terms of the ICA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

JAMES S. WHITEHEAD
(Counsel of Record)
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7703

NICHOLAS S. YOVANOVIC
JAMES D. TOMOLA
CSX Transportation, Inc.
500 Water Street
Jacksonville, Florida 32202

Attorneys for Petitioner
CSX Transportation, Inc.

Date: May 25, 1990

APPENDIX

STATUTORY PROVISION INVOLVED

Section 11341(a) of the Interstate Commerce Act, 49 U.S.C. § 11341(a) (1982):

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.